



PUBLIC NOTICE

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WIRELESS TELECOMMUNICATIONS BUREAU UPDATE ON ENVIRONMENTAL COMPLIANCE FOR PROPOSED TOWERS REQUIRING CLEAN WATER ACT PERMITS

In this Public Notice, the Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (FCC) notifies tower builders about the recent change in the definition of the “waters of the United States” provision of the Clean Water Act (CWA).¹ This change in the definition could affect tower builders with facilities requiring CWA permits, including facilities whose construction will involve significant change in surface features triggering the environmental assessment (EA) provisions under the FCC’s environmental rules.²

On August 30, 2021, the U.S. District Court for the District of Arizona (Court) vacated the Navigable Waters Protection Rule (NWPR) and remanded the rule to the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (collectively, Agencies).³ Since 2020, the NWPR had defined the meaning of the “waters of the United States” (WOTUS) provision of the Clean Water Act.⁴ After the Court vacated the NWPR, the Agencies halted application of the NWPR “in early September 2021,”⁵ and have been interpreting the WOTUS provision consistent with the pre-2015 WOTUS regulatory regime.⁶

Property owners, agents, or project proponents, including tower builders, submit requests for Corps “jurisdictional determinations” (JD) to identify projects requiring CWA permits due to potential

¹ 33 U.S.C. §1251 *et seq.* The CWA regulates “the discharge of any pollutant” into “the waters of the United States.” 33 U.S.C. §§1311(a), 1362(7), (12).

² 47 CFR § 1.1307(a)(7).

³ *Pascua Yaqui Tribe v. U.S. EPA et al.*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

⁴ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020). The CWA does not define WOTUS, but the Corps and the EPA have defined the term in regulations since the 1970s.

⁵ Press Release, EPA, EPA and Army Take Action to Provide Certainty for the Definition of WOTUS (Nov. 18, 2021), <https://www.epa.gov/newsreleases/epa-and-army-take-action-provide-certainty-definition-wotus#:~:text=On%20June%209%2C%202021%2C%20EPA,agricultural%20activity%2C%20and%20economic%20growth> (although the EPA press release did not come out until November 18, 2021, it states that “[i]n light of the court actions, the agencies have been implementing the pre-2015 regulatory regime nationwide since early September 2021.”).

⁶ Press Release, Army Corps of Eng., Navigable Waters Protection Rule Vacatur, (Jan. 5, 2022), <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/> (“[T]he agencies . . . are interpreting ‘waters of the United States’ consistent with the pre-2015 regulatory regime until further notice.”) (Corps Press Release). The Agencies have opened a rulemaking with the intent to revise the WOTUS definition. Press Release, EPA, EPA and Army Announce Intent to Revise Definition of WOTUS, (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69372 (Dec. 7, 2021) (proposed rule).

impacts to protected waters.⁷ A tower builder may request a preliminary (advisory) JD⁸ or an “approved jurisdictional determination” (AJD), which officially documents the presence or confirms the absence of WOTUS on a parcel of land.⁹ The Corps is applying the pre-2015 WOTUS regulatory regime to all requests for an AJD that were either pending on or received after the Court vacated the NWPR rule on August 31, 2021.¹⁰ The Corps has advised that it will not rely on an AJD issued under the NWPR in making a new permit decision.¹¹

The Corps has announced that it does not intend to reconsider permit decisions that relied on the NWPR before the Court’s vacatur.¹² While previously granted permits thus remain valid, tower builders should be aware that the Corps will not rely on a NWPR AJD in evaluating pending or future permit requests. The Corps stated that it will discuss options and potential implications with applicants.¹³ In light of the Corps’s announcement, we encourage tower builders holding a NWPR AJD or preliminary JD to contact the Corps to ascertain the potential implications of the revised WOTUS definition on permitting and environmental compliance obligations for their proposed facility.

Additional information on the Corps’s vacatur announcement may be found at: <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>.

⁷ When a property contains WOTUS, landowners who discharge pollutants without a permit from the Corps are subject to criminal and civil penalties under 33 U.S.C. § 1319(c)-(d). *See also* 33 CFR § 331.2 (defining “jurisdictional determination”).

⁸ *See* 33 CFR § 331.2 (“Preliminary JDs are written indications that there may be [WOTUS] on a parcel or indications of the approximate location(s) of [WOTUS] on a parcel. Preliminary JDs are advisory in nature and may not be appealed.”).

⁹ *See id.* *See also* 33 CFR § 331.2 (defining “approved jurisdictional determination”).

¹⁰ *See* Corps Press Release.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*